THE HIGH COURT

[2022] IEHC 519

RECORD NO. HCA00222/2022 – 00212/2021

BETWEEN

MUHAMMAD KHALID

APPELLANT

- and -

GERARD DAVIS

- and -

LONGFORD COUNTY COUNCIL

RESPONDENTS

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 28 July 2022

Introduction

1. The plaintiff issued proceedings in 2016 seeking damages for personal injury in respect of a car accident on 25 March 2015. The proceedings were issued in the Circuit Court, at which time the plaintiff had the assistance of a solicitor. After a full hearing the proceedings were dismissed by Order of Fergus J. on 27 November 2020. She did so pursuant to s.26 of the Civil Liability and Courts Act 2004 which provides for a dismissal of the plaintiff's claim either where a plaintiff knowingly gives false or misleading evidence or where the Court is satisfied that a person has sworn an affidavit under s.14 of the same Act that is false or misleading in any material respect.

2. The matter has now been appealed to this Court and I have heard evidence from the plaintiff himself, who is now no longer represented by solicitors and counsel, and is acting on his own behalf. I have also heard evidence from Mr. Davis of Longford County Council.
3. The defendant asks me to strike out the case on the basis that the plaintiff breached s.26(1) and s.26(2) of the 2004 Act. The defendant says that the plaintiff was not truthful in that he failed to identify two other road traffic accidents that were approximate in time to the index accident and that he caused doctors to give misleading evidence. The defendant focuses in particular on a reply to a particular of 2 March 2017 where the plaintiff was asked whether he had ever suffered any injuries in any accident prior to or subsequent to the alleged accident and was asked to give details of same. In the replies to particulars of 6 March, the plaintiff replied that he had not. The defendant also identified the affidavit of verification of the plaintiff of 6 March 2017 where those replies to the Notice for Particulars were verified.
4. Separately, the defendant argues that the plaintiff has not established a *prima facie* case and has failed to discharge the burden of proof upon him to show that the accident complained of caused his injuries.

Facts

5. In short, the facts are as follows. The plaintiff, who is a Pakistani national born in 1978, is married with children. He suffered 3 road accidents in rapid succession in 2015. This followed what he describes as 10 years driving in Ireland without his no claims bonus having been affected.
6. On 18 March 2015 he was driving on the motorway with his wife, his brother, and his 2 children. He was going at roughly 120km. He was wearing a seatbelt. The car in front of them was obliged to slow down and stop suddenly and he crashed into the back of

that car. Following that accident, he went to his GP, Dr. Ali, on the same day. The notes record as follows "*RTA… This morning… Was driving… Hit other car… Sustained one… Neck… To left side of the chest… Was shocked… Neck movements painful… Chest tender lower ribs… DIC LAC 50 mg BD*".

7. The plaintiff went to Midland Regional Hospital on 21 March 2018. The hospital notes record as follows "*presented with back pain, RTA this 6 AM on 18/03 hit into the back of another car was driving 120 km seatbelt on complaining of lumbar pain*". In the notes by the doctor there is a reference to back pain.
8. Following that accident his wife, his brother and his 2 children through his wife issued proceedings against him. He did not issue any proceedings. The car was written off in the accident. I cannot avoid the conclusion based on the evidence I have summarised that this was a serious accident and that the impact must have been significant, given the speed his car was travelling at before the accident, the condition of his vehicle after the accident and the injuries caused to his family who were in the car.
9. The second accident happened one week later. On 25 March 2015 he was stopped at a set of traffic lights at Ballymahon Street, Longford. Behind him was a dumper truck driven by Mr. Davis on behalf of Longford County Council, Mr. Davis is the first named defendant and Longford County Council is the second named defendant. The lights were red. There was a further set of traffic lights beyond the first set of lights. The further set of traffic lights went green. Mr. Davis wrongly concluded that the traffic lights where he was stopped had also gone green. In fact, they remained red. Mr. Davis in his evidence says that he released the brake of his vehicle but did not put the vehicle into gear. It rolled into the back of the car in which the plaintiff was a front seat passenger. The plaintiff says at the moment of impact he received a very sharp pain and that thereafter he was in very severe pain.

10. An ambulance was called and through miscommunication it was sent away. Another ambulance was called, and the plaintiff was taken to the Midlands Regional Hospital and an x-ray was taken which did not show any fractures. Unfortunately, the hospital notes are absent although there is a note of the ambulance call out. That records a reference to back pain. X-rays of his cervical and lumbar spine revealed no bony injury.
11. Following that accident, the plaintiff had a good deal of trouble with his back. According to his own account he was in very severe pain and had very restricted mobility. He went to his GP on seven occasions up to 23 July 2017, the first visit was on 27 March. The entry for that date recorded, *inter alia,* "*RTA… Sustained injury to his 1. neck 2. Lower back… He was quite nauseated, he went to MRH… Ambulance was called*". Pain in his lower back and neck is recorded and painful movement in all planes and it is indicated that he could not touch his toes. The entries in the following number of weeks recorded stiffness, pain in neck and lower back, and there is reference to "whiplash injury" with a question mark in the notes of 27 March.
12. On 23 July 2015, the plaintiff suffered his third injury and his third accident. He was driving alone in Dublin on the quays. He was hit by another car and his car spun around several times. An ambulance was called, and he was taken to St James's Hospital. The hospital records note that there is neck and lower back rib pain. However, they also note that there is no neck pain and that he has a range of movement in all directions. The notes also state that he was advised that he will experience neck pain and may even require physiotherapy. The plaintiff was not insured at the time of the accident, and he was prosecuted for that. As far as I can understand from his evidence, he was also prosecuted for offences in relation to his driving but was acquitted.

13. Following that accident, he visited his GP again. In each case his GP was Dr. Ali, and the notes state that he was involved in another accident, he sustained injury to his neck and lower back.

First medical report

14. On 21 July 2015 the plaintiff's GP, Dr. Ali, wrote to Sinnott solicitors, being after the first 2 accidents but before the third accident. In the letter he referred to the plaintiff having been involved in a road traffic accident on 25 March 2015 and his visit to the surgery on 27 March. There is reference to pain in his neck and pain in his lower back and subsequent reviews. He concludes that the plaintiff was involved in an accident and as a result he sustained injuries to his neck and lower back. No reference was made to the accident of 18 March. In my view, it was quite incorrect on the part of the plaintiff in requesting such a letter to be sent. He was well aware that he had had an accident the previous week on 18 March, following which he had indicated both to Dr. Ali and the hospital he visited three days later that he had neck and back pain. In the circumstances, Dr. Ali ought in my opinion to have mentioned that accident and its effect on the plaintiff in that letter to the plaintiff's solicitors.

Proceedings

15. On 22 November 2016 the plaintiff issued the within proceedings. No reference was made to the other accidents in the personal injuries summons.
16. As noted above, replies to particulars were provided on 6 March where the plaintiff denied the existence of any other injuries in response to the question as to whether he suffered any injuries in any accident prior to or subsequent to the alleged accident. Therefore, no particulars of the accidents of 18 March or 23 July were given.

Other medical reports

17. An examination was carried out by Mr. Evoy on behalf of the Personal Injuries Board. It is clear from the notes of that examination that the only accident referred to by the plaintiff was that of 25 March 2015. Again, the plaintiff ought to have informed Mr. Evoy of his two other accidents.
18. A further letter was sent on 27 February 2017 by Mr. Walsh GP referring to the accident of 25 March 2015 and the plaintiff's continuing complains of neck and back pain. No reference was made to the accident of 18 March or that of July. Dr. Walsh had only been his GP since August 2015, in other words just after the third accident, and therefore would not have known of that accident or the earlier accident on 18 March unless the plaintiff had informed him of same. In my view, the plaintiff ought to have informed him and ensured that this was referred to in the letter from Dr. Walsh. A similar picture emerges in relation to a report by a physiotherapist of 16 May 2017 where the only reference to an accident is that of 25 March 2015.
19. A report was done on 6 June 2017 by Mr. O'Rourke, consultant orthopaedic surgeon for Sinnott solicitors and this goes into some considerable detail in relation to the accident of 25 March 2015 but no reference is made to the other two accidents, except that it is stated that he was previously involved in a road traffic accident on 18 March 2015 but sustained no injuries.
20. Clearly the plaintiff had not provided Mr. O'Rourke with any information about his complaints of neck and back pain after that accident and his visit to the hospital on 21 March. Equally, he does not appear to have told him about the accident on 23 July 2015. Mr. O'Rourke says it is reasonable to conclude that he suffered soft tissue sprains to the cervical and lumbar regions and refers, in that context, to the accident of 25 March.

21. In the report of Dr. Azzam, another GP, of 25 April 2019, again no reference is made to any accident other than that of 25 March 2015. It is true that on 25 June 2019 the report of Dr. Ormond GP, does refer to the two other accidents, as does the report of Dr. Ali of 27 June 2019. However, at that stage an affidavit of discovery had been sworn by the plaintiff as he was obliged to do, and the documents identified in that affidavit included the medical records from Dr. Ali. As I have indicated above, those records referred to the accidents. Therefore, at that point in time the plaintiff knew that the defendants must have been aware of the accidents.

22. However, when Dr. Ali referred him to Mr. Cawley, spinal surgeon in the Mater Hospital, he only identified the accident of 25 March 2015 in his referral letter and again no reference was made to the other two accidents. Mr. Cawley concluded that the plaintiff had a non-union of AC spinous process and this was consistent with a hyper extension/hyper flexion cervical spine injury from a road traffic accident.

Decision

23. From the above account of matters, it may be seen that the plaintiff has consistently ignored the two other accidents in his proceedings and in his interaction with medical practitioners and has identified only the accident of 25 March 2015.

24. This has given rise to very significant difficulties for this Court. One only needs to consider what the plaintiff ought to have done and what would have taken place if the plaintiff had been open about the three accidents, to understand the difficulty the Court faces. Had the plaintiff provided a letter to his solicitors where Dr. Ali identified all three accidents and had the plaintiff informed his solicitors that he had suffered three accidents in close proximity to each other, that fact would very likely have been referred to in the pleadings. At the very least, that information would have been provided in the

replies to particulars. At that point the defendants would have sought and obtained detailed particulars in relation to each of the three accidents.

25. The medical evidence that the plaintiff would have obtained would have referred to the three different accidents and presumably would have made some attempt to identify, by reference to his injuries, the contribution each accident had made to those injuries.

26. It is particularly notable that in each of the three accidents, the medical records refer to complaints being made by the plaintiff in relation to his back and neck following the accidents. Each of the accidents appear from the records to have impacted upon his back and neck.

27. The defendant would presumably have contested the case now being made i.e. that the accident of 25 March 2018 is the sole cause of his injuries and that the two other accidents had no impact upon him. They would have obtained medical evidence that would have engaged with this issue. At the hearing, medical experts and possibly the plaintiff would have been examined and cross examined in relation to the question of the relative contributions of each accident to his injuries. Unfortunately, because the plaintiff decided to ignore the other accidents and indeed, at points in the proceedings, deny their existence, that exercise did not take place.

28. It is now impossible, as a result, for me to carry out the task that I am charged with in adjudicating upon these proceedings. That task is to decide whether (a) the defendant was negligent in carrying out a particular task (b) whether the plaintiff has suffered an injury and (c) critically, to decide whether the injury was caused by the negligent act.

29. I think it is fair to say that the plaintiff has established negligence in that the first defendant's rear ended the car in which he was a passenger. Second, having regard in particular to the report of Dr. Cawley, he has established that he has suffered an injury likely caused by an impact. However, what he signally has failed to do is to put before

the Court evidence that shows that his injuries were caused or contributed to by the accident of 25 March as opposed to the accidents of 18 March and 23 July where, in both cases, he also suffered neck and back pain.

30. It is always difficult when there are three accidents so close in time together, all of which affect the same area of a person's body, to disentangle the cause of an injury or its contribution. Sometimes, it may be possible on the basis of the medical evidence and/or other evidence to attribute a certain percentage of the injury to the accident the subject of the proceedings.

31. However, that becomes impossible when the proceedings have been brought on the wrong footing from the very beginning i.e. on the basis that no other accidents had occurred. The plaintiff's medical practitioners appear to have been either persuaded to acquiesce in this inappropriate approach or were simply not informed of the other accidents.

32. I want to turn now to the decision of the Supreme Court in *Vesey v Bus Éireann* [2001] 4 IR 192. In that case, the plaintiff had had four previous accidents. He was found to have lied such that his doctors' opinions were almost useless as they depended on the veracity of the history given to them by the plaintiff. There were damages awarded to the plaintiff in the High Court and the case was appealed to the Supreme Court. In his judgment, Hardiman J. observed as follows:

> *"17. It also became perfectly clear that the Plaintiff had made only a very partial disclosure of his history to certain of his own medical advisers. In particular, Dr. Lorna Browne, a pain specialist, stated in cross-examination that she was unaware of the history set out in the statement of claim in the Plaintiff's prior proceedings. She conceded that she would have expected to have been told about these symptoms.*

18. On a careful review of the evidence I am quite satisfied that the learned trial judge's observations quoted above were fully justified.

...

24. I cannot agree, either, that it is the responsibility of a trial judge to "disentangle" the Plaintiff's case when it has become entangled as a result of lies and misrepresentations systematically made by the Plaintiff himself. The procedure in our courts is an adversarial one and the Defendant is entitled to have the Plaintiff's case presented by him and accepted on its merits or otherwise as these appear from the Plaintiff's presentation and cross-examination. For the trial judge to make on behalf of the Plaintiff the best case he can in such circumstances would risk the loss of the appearance of impartiality. The learned trial judge was quite correct to point out that the onus was on the Plaintiff and that he had, in significant respects, failed to discharge it. It may be the submissions in relation to "disentangling" are more relevant to the learned trial judge's eventual decision when, having eloquently pointed out the shortcomings in the Plaintiff's evidence, he went on to make the awards summarised above. I will return to that topic later in this judgment.

25. In general, I agree with the main thrust of Mr. Fox's submissions. The learned trial judge himself said:-

> *"I accept that he suffered some damage but as to what the damage was, I can only speculate".*

26. It seems to me that this is not a correct basis on which to approach the assessment of damages and that a Defendant is entitled to have the exercise approached in a more specific and evidence based fashion."

33. This is a perfect example of a case where I cannot disentangle the truth and can only speculate about the extent to which the accident of 25 March caused or contributed to the plaintiff's injuries. It would be quite inappropriate for me to make a guess as to the extent to which the accident of 25 March was a contributing factor to his injuries. Unfortunately, because of the approach of the plaintiff as outlined above, I could only guess because I have no concrete evidence on which to base an evaluation in that respect.

34. If the other two accidents were much more distant in time from the index accident or if they had affected different parts of his body or if they were manifestly not serious accidents, and if the plaintiff had been open about them from the start but had perhaps failed to obtain medical evidence identifying the differential contribution of each accident, it might have been possible for me to attempt to make an assumption in relation to the contribution of the index accident to his injuries.

35. Here however where the accidents are so close in time, where the accident of 18 March was undoubtedly a very serious one and where all the accidents injured him in the same place, i.e. his neck and back, it is quite impossible to make a finding on the contribution of his accident of 25 March to his injuries.

36. The plaintiff now says that he was not truthful to Dr. Ali in relation to the impact of the accident of 18 March and that he told him he had neck and back pain simply because he was tired but that it was not true and that he had not suffered such pain. He now adopts the position that he was not telling the truth to Dr. Ali.

37. In relation to his visit to the hospital on 21 March he said in evidence to me that he mentioned back pain, not because he was actually suffering from back pain, but because he thought he was entitled to damages because he had paid insurance and had obtained a no claims bonus over the past 10 years.

38. I think on balance it is likely that he did suffer back pain after the accident of 18 March and that he was telling the truth to Dr. Ali and to the hospital when he recorded same. I have proceeded on the basis that this is the correct position rather than the position he later adopted i.e. that he was in fact lying in that respect.

39. He has given evidence very passionately to the effect that he is convinced that it was only the accident of 25 March that caused his injuries and that the accidents of 18 March and 23 July had no effect on him. I have no doubt that he himself believes that to be the position. However, I cannot award damages to him on the basis of his own belief as to which of the accidents caused or contributed to his injuries without evidence to that effect.

40. I should add that the plaintiff continually asked me during the proceedings to launch an investigation into the events of 2015 and to direct witnesses to attend on the basis of an affidavit he had sworn. I gave a ruling early on yesterday that such an application was misguided and misunderstood the approach of the Court, whereby hearings are carried out on an adversarial basis rather than an inquisitorial basis, and that it is not for a judge to launch an investigation or to direct witnesses.

41. Accordingly, in summary, I must dismiss the plaintiff's case on the basis that he has failed to discharge the burden of proof of showing that his injuries were caused or contributed to by the accident of 25 March 2015.

Section 26(1)

42. The defendant also asks me to make an Order pursuant to s.26(1) and 26(2). Unfortunately, I have concluded that I ought to accede to that request. The plaintiff failed to inform his solicitor of the other accidents. The reply to particulars was incorrect and the plaintiff must have known it was incorrect. The very first medical

report provided by Dr. Ali. to Sinnott solicitors was manifestly incomplete. Therefore, I find that the case should also be dismissed under s.26(1).

43. Similarly, the affidavit of verification in relation to the particulars was absolutely incorrect and the plaintiff must have known this. Therefore, I find that the case should be dismissed under s.26(2) also.

44. I have to consider the balance of justice when I am dismissing a case under s.26 and in the circumstances of this case I cannot conclude that the balance of justice would warrant refusing to make an Order under s.26. As identified above, I have concluded that the plaintiff has not discharged the burden of proof incumbent upon him. In those circumstances, the balance of justice does not suggest I should refuse to make an Order under s.26.